THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

LUCINDA KAY SWAIM,
Grievant,

v. **DOCKET NO. 2012-0263-MorED**

MORGAN COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Lucinda Kay Swaim, filed a grievance against her employer, the Morgan County Board of Education, on September 7, 2011. The statement of grievance reads:

> Grievant contends that she was entitled to a long-term substitute assignment at Warm Springs Intermediate School based upon her preferred recall status and substitute seniority, whether the position was posted or filled through rotation. Grievant asserts a violation of W. Va. Code 18A-4-8b, 18A-4-8g & 18A-4-15.

As relief Grievant sought, "assignment to the aide/autism mentor position at Warm Springs Intermediate School and compensation wages and other benefits lost retroactive to the beginning of the [sic] August 18, 2011 as a result of Respondent's failure to assign Grievant to the position at Warm Springs Intermediate School."

A hearing was held at level one on September 15, 2011, and a level one decision denying the grievance was issued on October 17, 2011. Grievant appealed to level two on October 20, 2011, and a mediation session was held on March 30, 2012. Grievant appealed to level three on April 11, 2012. A level three hearing was held before the undersigned Administrative Law Judge on July 18, 2012, at the Grievance Board's Westover office. Grievant was represented by John Everett Roush, Esquire, West Virginia

School Service Personnel Association, and Respondent was represented by Denise M. Spatafore, Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision on August 24, 2012, on receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was reduced-in-force and placed on the preferred recall list as an Aide. Grievant believed she was entitled to placement into a substitute Aide/Autism Mentor position ahead of any employee on the substitute employment list, because she was on preferred recall and substitute employment was a temporary position within the meaning of the statute. A substitute position is not a temporary position as that term is used in the preferred recall provisions. Grievant could not be recalled to fill the substitute position ahead of employees on the substitute list.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievant has been employed by the Morgan County Board of Education ("MBOE") since August 20, 2002. She was initially employed full-time as a Custodian. Prior to her full-time employment, she was employed by MBOE as a substitute Cook, Aide, and Custodian.

2. On August 18, 2010, Grievant began working in the Aide classification, transferring from a position as a Custodian to an Aide/Autism Mentor vacancy at Warm Springs Middle School.

3. Grievant was not certified as an Autism Mentor, and still is not certified as an Autism Mentor, but she was placed in the vacant position because no certified Autism Mentors applied for the position.

4. On January 7, 2011, Grievant was notified that she would be reduced-in-force at the end of the 2010-2011 school year, due to a county-wide reduction in the number of positions, and based on her seniority in the Aide classification. Grievant was placed on the preferred recall list at the end of the 2010-2011 school year in the Aide classification, and also in the Custodian and Cook classifications because she had previously worked in those classifications.

5. In May 2011, MBOE posted an Autism Mentor/Aide position at Warm Springs Middle School. Mary Collins was certified as an Autism Mentor, and she was the successful applicant for the position.

6. In August 2011, MBOE posted an Autism Mentor/Aide position at Warm Springs Intermediate School. Mary Collins was the successful applicant for this position. Because the position was not filled until five days before the beginning of the school year, MBOE believed that Ms. Collins could not legally be moved into this position. A substitute Aide, Linda Bolton, was the next employee in line to be called off the substitute employee rotation list who accepted the employment, and she was placed in this position for the 2011-2012 school year.[1]

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[1] Grievant in her testimony at level three seemed to raise for the first time the issue of whether Ms. Collins should have been awarded this position when she could not be placed in it. This is certainly not what is being contested in the statement of grievance. Grievant's representative did not pursue this argument either at the hearing or in post-hearing written argument, and did not present any legal challenge to Respondent's conclusion that Ms. Collins would be placed in the position at the beginning of the next

7. As of August 17, 2011, Grievant was the most senior Aide on the preferred recall list.

8. In March 2011, MBOE posted an Aide position at Paw Paw Elementary School. Grievant was not aware of this posting and did not apply for the position. In August 2011, MBOE posted this Aide position at Paw Paw Elementary School a second time. Grievant was notified by MBOE of the posting, but did not apply for the position. Had she applied, Grievant would have been awarded this position as the most senior Aide on preferred recall. Grievant did not apply for this position because she was only interested in Autism Mentor positions, and she did not want to make the drive from her home to Paw Paw Elementary School.

9. At the beginning of the 2011-2012 school year, MBOE placed the names of all service personnel employees who were on preferred recall on the substitute list. Grievant's substitute seniority in the Aide classification was calculated, and her name was placed on the substitute list according to her seniority date.[2] Grievant did not accept any substitute employment offered to her, and testified at the level three hearing that she found it to be a demotion to be placed on the substitute list. She asked that her name be removed from the substitute list.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public

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school year. Accordingly, this argument will not be addressed.

[2] Grievant did not contest Respondent's calculation of her substitute seniority.

Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ*., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant's argument is that she should have been recalled from the preferred recall list to fill the position at issue for the 2011-2012 school year because it was a "temporary" position, pointing to the language found in W. VA. CODE § 18A-4-8b(n) and (q), rather than Respondent filling the position with a substitute employee. The statutory provisions cited by Grievant provide as follows:

> (n) A service person placed upon the preferred recall list shall be recalled to any position openings by the county board within the classification(s) where he or she had previously been employed, to any lateral position for which the service person is qualified or to a lateral area for which a service person has certification and/or licensure.
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> . . .
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> (q) No position openings may be filled by the county board, whether temporary or permanent, until all service personnel on the preferred recall list have been properly notified of existing vacancies and have been given an opportunity to accept reemployment.

As Respondent points out, the very issue raised by Grievant has already been addressed by the Grievance Board in *Byers v. Marion County Board of Education*, Docket No. 94-24-388 (Dec. 29, 1995). Grievant did not attempt to distinguish this case from her situation. In *Byers*, the board of education had been doing exactly what Grievant has

argued should have been done by Respondent, that is, using the preferred recall list to fill vacancies which would otherwise be filled by substitute employees, pursuant to W. VA. CODE § 18A-4-15. The Administrative Law Judge found that this practice was in violation of the clear statutory language regarding placement of substitutes in positions, and **specifically addressed the use of the word "temporary" in the statute**, stating:

> Clearly, MCBE's policy and practice of taking preferred recall aides, or any other similar service employees, "out of rotation" on the substitute list and giving them all of the substitute jobs of five or more days' duration is violative of Code §18A-4-15. Moreover, nothing in Code §18A-4-8b gives employees on the preferred recall list preference rights over substitute employees for temporary, substitute assignments of five days or longer. Among other things, Code §18A-4-8b deals with the recall rights of regular workers who have been reduced in force and who have preferred status for true vacancies, whether permanent or temporary. MCBE has placed too much emphasis on the word "temporary" in this statute. In context, the word temporary means a temporary regular position and not a temporary "substitute" position. . . .. For example, a temporary regular position could be a job at a particular school that will end in a year due to the school's closing. There is nothing in Code §18A-4-15 which provides for the placement of a substitute worker under that circumstance. For those occasions when certain temporary substitute positions are available, Code §18A-4-15 provides that the jobs should be posted and filled pursuant to Code §18A-4-8b. Only under those circumstances would regular service employees and those on preferred recall have priority over substitute service employees for the jobs.[3]

(Footnote omitted.) This ruling was followed in *Hall v. Mingo County Board of Education*, Docket No. 97-29-420 (Jan. 21, 1998).

As a general rule, this Grievance Board adheres to the doctrine of *stare decisis* in adjudicating grievances that come before it. *Chafin v. W. Va. Dep't of Health & Human Resources*, Docket No. 92-HHR-132 (July 24, 1992), *citing Dailey v. Bechtel Corp.*, 157

[3] Grievant did not dispute that this position was otherwise a substitute position, nor did she argue that it should have been posted.

W. Va. 1023, 207 S.E.2d 169 (1974). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error. *Shaffer v. Kanawha County Bd. of Educ.*, Docket No. 00-20-085 (June 12, 2000); *Belcher v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-341 (Apr. 27, 1995). The undersigned has not been presented with any justification for finding that these prior Grievance Board decisions were clearly in error.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. "W. VA. CODE §§ 18A-4-15 and 18A-4-8b do not authorize a county board of education, absent proper posting, to offer substitute assignments to employees holding preferred recall status before offering such assignments to substitute personnel on a rotating basis according to their seniority. *Byers v. Marion County Bd. of Educ.,* Docket No. 94-24-388 (Dec. 29, 1995)." *Hall v. Mingo County Bd. of Educ.*, Docket No. 97-29-420 (Jan. 21, 1998).

3. "In context, the word temporary [in W. VA. CODE § 18A-4-8b] means a temporary regular position and not a temporary "substitute" position." *Byers, supra.*

4. As an employee on preferred recall, Grievant could not be placed in a substitute position ahead of employees on the substitute list.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Acting Deputy Chief
Administrative Law Judge

Date: September 20, 2012